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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GINA DEMARIA,

Plaintiff,

v.

BIG LOTS STORES - PNS, LLC, et al.,

Defendants.

No. 2:23-cv-00296-DJC-CKD

ORDER

Pending before the Court are Plaintiff's Motion to Remand (ECF No. 18) and Defendants' Motion to Compel Arbitration (ECF No. 7). The Court held a hearing on both motions on August 31, 2023 and ordered Defendants to file a revised declaration for their Motion to Compel Arbitration and Plaintiff to file a sur-reply to the Motion to Compel Arbitration. (ECF No. 27.) Following these filings (ECF Nos. 28, 29) the Court took the matters under submission.

For the reasons set forth below, the Court will DENY Plaintiff's Motion to Remand, and GRANT Defendants' Motion to Compel Arbitration.

**BACKGROUND**

Plaintiff Gina DeMaria filed this class action against Defendants in the Solano County Superior Court on October 18, 2022, alleging various wage and meal/rest period violations under California law. (*See generally* Compl. (ECF No. 1-1).)

1 Specifically, Plaintiff alleges: (1) failure to pay overtime wages; (2) failure to pay  
2 minimum wages; (3) failure to provide meal periods; (4) failure to provide rest  
3 periods; (5) waiting time penalties; (6) wage statement violations; (7) failure to  
4 indemnify; (8) violation of California Labor Code section 227.3 (vacation time); and (9)  
5 unfair competition. (*Id.*) Defendants timely removed this action on February 17, 2023,  
6 under the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332(d). (Not.  
7 Removal (ECF No. 1) ¶¶ 3-5.) Defendants argue removal is proper because: the state  
8 court action is styled as a class action (*id.* ¶ 11), the proposed class contains at least  
9 100 members (approximately 1,308 potential class members) (*id.* ¶ 21), there is  
10 minimal diversity of citizenship between Plaintiff and Defendants (*id.* ¶¶ 22-34), and  
11 the amount-in-controversy is \$9,103,930.66, exceeding the \$5 million requirement  
12 under CAFA (*id.* ¶ 94). Plaintiff subsequently moved to remand this action on May 17,  
13 2023, arguing that Defendants failed to provide adequate evidence demonstrating  
14 the amount-in-controversy exceeds \$5 million (Mot. Remand (ECF No. 18) at 7) and  
15 that this Court lacks equitable jurisdiction over Plaintiff's Unfair Competition Law  
16 ("UCL") claim for restitution of wages (*id.* at 16).

17 Defendants have also filed a Motion to Compel Arbitration arguing Plaintiff  
18 voluntarily signed a binding arbitration agreement (the "Agreement") on September  
19 16, 2019, by which she agreed to arbitrate any disputes or claims related to her  
20 employment or termination thereof and waived the right to pursue class claims. (Mot.  
21 Compel Arb. (ECF No. 7) at 1.) Plaintiff opposes, arguing that Defendants failed to  
22 prove that the Agreement exists, and that the Agreement, even if it exists, is  
23 unconscionable and therefore unenforceable. (Opp'n Arb. (ECF No. 11).) Defendants  
24 reply that Plaintiff has not rebutted the existence of the Agreement, any challenges to  
25 the Agreement should be delegated to the arbitrator per a delegation clause in the  
26 Agreement, and the Agreement is not unconscionable. (Reply Arb. (ECF No. 12).)  
27 Finally, Plaintiff argues in response that the delegation clause itself is unconscionable  
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1 and therefore unenforceable. (Suppl. Opp'n Arb. (ECF No. 29).) The Court addresses  
2 each Motion in turn below.<sup>1</sup>

3 **MOTION TO REMAND**

4 **I. Legal Standard**

5 “[A]ny civil action brought in a State court of which the district courts of the  
6 United States have original jurisdiction, may be removed by the defendant, or the  
7 defendants, to the district court of the United States for the district . . . where such  
8 action is pending.” 28 U.S.C. § 1441(a). Under CAFA, the federal courts have original  
9 jurisdiction over class actions in which the parties are minimally diverse, the proposed  
10 class has at least one hundred members, and the aggregated amount-in-controversy  
11 exceeds \$5 million dollars. *See* 28 U.S.C. § 1332(d)(2), (5).

12 A defendant removing a class action filed in state court pursuant to CAFA need  
13 only plausibly allege in the notice of removal that the CAFA prerequisites are satisfied.  
14 *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 87 (2014). If the plaintiff  
15 seeks to remand that action back to state court, however, the defendant bears the  
16 evidentiary burden of establishing federal jurisdiction under CAFA by a  
17 preponderance of the evidence. *See id.* at 88 (quoting 28 U.S.C. § 1446(c)(2)(B)); *see also Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 978 (9th Cir. 2013). “If at  
18 any time before final judgment it appears that the district court lacks subject matter  
19 jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c); *see also Smith v. Mylan,*  
20 *Inc.*, 761 F.3d 1042, 1044 (9th Cir. 2014); *Brunsv. NCUA*, 122 F.3d 1251, 1257 (9th  
21 Cir. 1997). The Supreme Court has advised, however, “that no antiremoval  
22 presumption attends cases invoking CAFA” in part because the statute was enacted  
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25 <sup>1</sup> Pursuant to Federal Rule of Evidence 201, the Court grants Defendant's unopposed request for  
26 judicial notice of (1) the Order Granting Final Approval of Class Action Settlement in *Hubbs v. Big Lots*  
27 *Stores, Inc.*, No. LA CV15-01601-JAK-ASx (C.D. Cal. July 14, 2021) and (2) the Notice of Ruling Granting  
28 Defendant West Coast Liquidators, Inc.'s Motion to Compel Arbitration in *Sanford v. West Coast*  
*Liquidators, Inc.*, No. 20STCV18055 (Cal. Super. Ct. Sept. 20, 2022) (“*Sanford Ruling*”) in support of their  
Motion to Compel Arbitration. (See ECF Nos. 3, 8.) However, the Court notes it does not take judicial  
notice of the truth of any facts or allegations included therein.

1 "to facilitate adjudication of certain class actions in federal court," and that "CAFA's  
2 provisions should be read broadly, with a strong preference that interstate class  
3 actions should be heard in a federal court if properly removed by any defendant."  
4 *Dart Cherokee*, 574 U.S. at 89 (citations and quotations omitted); *see also Ibarra v.*  
5 *Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015).

6 **II. Discussion**

7 The Parties do not dispute that they are diverse or that the proposed class has  
8 at least one hundred members; the only issues before the Court are whether the  
9 amount-in-controversy exceeds \$5 million, and whether the Court must remand  
10 because it lacks equitable jurisdiction over Plaintiff's UCL claim.

11 For the reasons below, remand will be denied.

12 **A. Amount-in-Controversy**

13 When a plaintiff's complaint does not quantify damages, defendants must show  
14 by a preponderance of the evidence that the amount-in-controversy exceeds the  
15 jurisdictional threshold. *Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 849 (9th  
16 Cir. 2020). A defendant is only required to show that it is more likely than not that the  
17 plaintiff's maximum recovery could reasonably be over \$5 million. *Avila v. Rue21, Inc.*,  
18 432 F. Supp. 3d 1175, 1185 (E.D. Cal. 2020). This burden is not daunting as "a  
19 removing defendant is not obligated to 'research, state, and prove the plaintiff's  
20 claims for damages.'" *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1204-  
21 05 (E.D. Cal. 2008) (citation omitted). Rather, in making this showing, a removing  
22 defendant "must be able to rely 'on a chain of reasoning that includes assumptions  
23 ....'" *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 993 (9th Cir. 2022)  
24 (quoting *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200, 1201 (9th Cir. 2015)); *see also*  
25 *id.* ("[A] CAFA defendant's amount-in-controversy assumptions in support of removal  
26 will always be just that: *assumptions.*" (emphasis in original)). These assumptions must  
27 reflect more than "mere speculation and conjecture," *Ibarra*, 775 F.3d at 1197, and  
28 they "need some reasonable ground underlying them," *id.* at 1199, but they "need not

1 be proven," *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019).  
 2 Assumptions may be reasonable if they are "founded on the allegations of the  
 3 complaint." *Arias*, 936 F.3d at 925. Parties may also submit evidence outside the  
 4 complaint, including affidavits, declarations, or other summary-judgment type  
 5 evidence relevant to the amount-in-controversy. *Ibarra*, 775 F.3d at 1197.

6       The plaintiff can contest the amount-in-controversy by making either a "facial"  
 7 or "factual" attack on the defendant's jurisdictional allegations. *Harris v. KM Indus., Inc.*, 980 F.3d 694, 699 (9th Cir. 2020). "A facial attack accepts the truth of the  
 8 [defendant's] allegations but asserts that they are insufficient on their face to invoke  
 9 federal jurisdiction." *Id.* (citations and quotations omitted). A factual attack, on the  
 10 other hand, contests the truth of the allegations themselves. *Id.* When a plaintiff  
 11 mounts a factual attack, they "need only challenge the truth of the defendant's  
 12 jurisdictional allegations by making a reasoned argument as to why any assumptions  
 13 on which they are based are not supported by evidence." *Id.* at 700.

14       Here, the Complaint does not specify an amount-in-controversy, thus  
 15 Defendants have presented their own amount-in-controversy calculation, arguing the  
 16 operative amount is \$9,103,930.66. (Not. Removal ¶ 94.) Plaintiff mounts a factual  
 17 attack on Defendants' calculation disputing whether Defendants have sufficiently  
 18 supported the assumptions undergirding their amount-in-controversy calculation.  
 19 (Reply Remand (ECF No. 23) at 3.) The primary form of evidence Defendants offer in  
 20 support of removal is a declaration from Kim Thacker (the "Thacker Declaration"), a  
 21 paralegal in the legal department at Big Lots, who collected and reviewed data for  
 22 non-exempt employees in California employed by Big Lots between February 3, 2020,  
 23 and June 15, 2022<sup>2</sup> reflecting: (a) payroll and timekeeping records in each pay period  
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 26       <sup>2</sup> Defendants explain that the prior settlement reached between Defendants and the putative class in  
 27 the *Hubbs* Order released claims by non-exempt employees in California against Defendants from  
 28 February 7, 2010 through February 3, 2020, limiting the relevant time period here to any time from  
 February 3, 2020 through resolution or trial of this matter. (Not. Removal ¶¶ 15-20.) Defendants also  
explain that the number of associates and the class period is based on a similar case pending against  
Big Lots Stores in the Eastern District of California captioned *Cornejo v. Big Lots Stores, Inc.*, No. 22-cv-

1 during the relevant period; (b) the number of employees in California during the  
2 relevant period; (c) the number of weeks that each employee in California worked  
3 during the relevant period; and (d) the rates of pay during the relevant period.  
4 (Thacker Decl. (ECF No. 1-3) ¶¶ 10-12.) Based on the data collected by Thacker,  
5 Defendants calculated the amount-in-controversy as follows:

- 6 • Failure to pay overtime wages: Defendants assumed one hour of unpaid  
7 overtime per week and multiplied the overtime rate of \$22.33 (the average  
8 hourly rate of \$14.89 x 1.5<sup>3</sup>) by 45,463 (the number of weeks worked by  
9 class members during the relevant period) to equal **\$1,015,188.79**. (Not.  
10 Removal ¶¶ 44-52.)
- 11 • Failure to pay minimum wages: Defendants assumed one hour of unpaid  
12 minimum wages per week and multiplied \$13.00 (the lowest California  
13 minimum wage during the relevant period<sup>4</sup>) by 45,463 (the number of  
14 weeks worked by class members during the relevant period) to equal  
15 \$591,019.00. Because the Complaint also seeks liquidated damages<sup>5</sup>  
16 Defendants doubled this amount to equal **\$1,182,038.00**. (*Id.* ¶¶ 53-66.)
- 17 • Failure to provide meal periods and rest periods: Defendants assumed a  
18 violation rate of 40% for meal and rest period violations, i.e., two violations

21 001247-MCE-DB. *Cornejo* was also removed from state court, and was served on Big Lots Stores on  
22 June 14, 2022, seven months before Plaintiff served the current Complaint. (Opp'n Remand (ECF No.  
23 22) at 3 n.1.) Thus, the class period in this case would be at least seven months larger. Additionally,  
24 *Cornejo* only named Big Lots Stores, Inc., while Plaintiff's Complaint names additional entities, which  
increases the number of putative class members. Defendants did not incorporate these larger data  
points for purposes of calculating the amount in controversy for this case, such that several of their  
damage estimates are likely conservative.

25 <sup>3</sup> Each non-exempt employee is entitled to be paid one and one-half times her regular rate of pay for  
time worked in excess of 8 hours per workday and/or more than 40 hours per workweek. Cal. Lab.  
Code § 510.

26 <sup>4</sup> See Cal. Lab. Code § 1182.12.

27 <sup>5</sup> In any action under California Labor Code sections 98, 1193.6, 1194, or 1197.1 to recover wages  
because of the payment of a wage less than the minimum wage fixed by an order of the commission or  
by statute, an employee is entitled to recover liquidated damages in an amount equal to the wages  
unlawfully unpaid and interest thereon. Cal. Lab. Code § 1194.2(a).

1 per week each, and multiplied \$14.89<sup>6</sup> (the average hourly rate) by 45,463  
2 (the number of weeks worked by class members during the relevant period)  
3 by two (the number of violations) to equal \$1,353,888.14 for the meal-  
4 period claim and \$1,353,888.14 for the rest-period claim. Thus, in total,  
5 Defendants valued these claims at **\$2,707,776.28.** (*Id.* ¶¶ 67-79.)

- 6 • Failure to pay timely wages upon termination (i.e., waiting time penalties):  
7 Defendants assumed a violation rate of 100% and multiplied \$14.89 (the  
8 average hourly rate) by 5.7 hours (the average shift length) by 30 days (the  
9 maximum days for continuation of wages) by 934 (the number of potential  
10 class members who are former employees) to equal **\$2,378,141.46.** (*Id.*  
11 ¶¶ 80-91.)
- 12 • Attorneys' fees: Defendants' set attorneys' fees<sup>7</sup> at 25% of the damages  
13 calculated above, which total \$7,283,144.53, making attorneys' fees  
14 **\$1,820,786.13.** (*Id.* ¶¶ 92-94.)

15 In total, Defendants estimated the amount-in-controversy to be  
16 **\$9,103,930.66.** (*Id.* ¶ 94.)

17 Plaintiff challenges this amount by arguing that (1) the Thacker Declaration is  
18 insufficient by itself to support Defendants' calculations, and (2) Defendants'  
19 calculations are speculative and arbitrary.

## 20       **1.       Sufficiency of the Thacker Declaration**

21 Plaintiff argues that the Thacker Declaration by itself is inadequate evidentiary  
22 support for Defendants' calculations because Thacker "point[s] vaguely to [her] review  
23 of data without identifying specifics regarding what such data might encompass,  
24 where it was obtained, or why the Court should consider it trustworthy or authentic."

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26       <sup>6</sup> An employee who does not receive a meal or rest period to which she is entitled shall be paid one  
hour of pay at her regular rate of compensation as premium pay. *See Cal. Lab. Code § 226.7(b).*

27       <sup>7</sup> Attorney's fees may be included when calculating the amount in controversy supporting CAFA  
jurisdiction. *See Galt v. Scandinavia*, 142 F.3d 1150, 1156 (9th Cir.1998) ("We hold that where an  
underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary  
language, such fees may be included in the amount in controversy.").

1 (Mot. Remand at 9.) Courts have adopted various approaches regarding the  
2 sufficiency of affidavits for supporting amount-in-controversy calculations. *Compare*  
3 *Dunn v. SHC Servs.*, No. 1:21-cv-00744-NONE-SAB, 2021 WL 5122057, at \*7-10 (E.D.  
4 Cal. Nov. 4, 2021) (granting remand); *Farley v. Dolgen Cal. LLC*, No. 2:16-cv-02501-  
5 KJM-EFB, 2017 WL 3406096, at \*3-5 (E.D. Cal. Aug. 9, 2017) (granting remand), *with*  
6 *Johnson v. Bamia 2 LLC*, No. 2:22-cv-00548-KJM-AC, 2022 WL 2901579, at \*2 n.2, 4  
7 (E.D. Cal. July 22, 2022) (denying remand); *Bartholomew v. Goodman Mfg. Co., L.P.*,  
8 No. 2:22-cv-00027-TLN-AC, 2022 WL 4355147, at \*3 (E.D. Cal. Sept. 20, 2022)  
9 (denying remand (collecting cases)).

10 In resolving these varied approaches, the Court takes note of the recent Ninth  
11 Circuit decision in *Jauregui*, 28 F.4th at 991, 994-95. There, the Ninth Circuit rebuked  
12 the district court for its “inappropriate demand of certitude from [defendant] over its  
13 assumptions used in calculating the amount-in-controversy” and turning the CAFA  
14 removal process into “an unrealistic all-or-nothing exercise of guess-the-precise-  
15 assumption-the-court-will-pick—even where, as here, the defendant provided  
16 substantial evidence and analysis supporting its amount in controversy estimate.” 28  
17 F.4th at 993-94 (reversing remand when defendant provided “substantial evidence” in  
18 support of its amount-in-controversy calculation in the form of a declaration from a  
19 senior payroll lead who reviewed the company’s payroll data and calculated the  
20 potential value of the claims). District court decisions following *Jauregui*, including  
21 *Johnson* and *Bartholomew*, accordingly strike a more lenient tone than earlier  
22 decisions regarding the sufficiency of declarations to support amount-in-controversy  
23 analyses. *See, e.g., Rios v. Magellan HRSC, Inc.*, No. 2:22-cv-01219-KJM-AC, 2022 WL  
24 5241292, at \*1 (E.D. Cal. Oct. 6, 2022) (denying remand based on amount-in-  
25 controversy calculations drawn from a declaration of defendant’s vice president who  
26 was familiar with the company’s payroll records). Indeed, all but one of the cases cited  
27 by Plaintiff in their Motion to Remand predate the Ninth Circuit’s decision in *Jauregui*.  
28 The only decision issued after, *Ryan v. Mission Treatment Services, Inc.*, No. 2:22-cv-

1 04013-ODW-MARx, 2022 WL 4331093 (C.D. Cal. Sep. 19, 2022), notably fails to  
2 address *Jauregui* whatsoever.

3 As the Thacker Declaration is similar to the declarations relied on in *Jauregui*  
4 and cases following *Jauregui*, the Court finds it sufficient to support Defendants'  
5 amount-in-controversy analysis.

6 **2. Reasonableness of Defendants' Calculations**

7 Plaintiff alleges that Defendants unreasonably assume one hour of unpaid  
8 minimum wages and overtime each week and a 40% meal and rest break violation  
9 rate given that Plaintiff uses language limiting the frequency of the violations  
10 throughout the Complaint. (Mot. Remand at 10-13). Plaintiff similarly alleges the  
11 100% violation rate for waiting time penalties is unsupported by the Complaint. (*Id.* at  
12 13-14.) Finally, Plaintiff alleges Defendants have presented no justification for  
13 assuming attorneys' fees amount to 25% of the damages award. (*Id.* at 15-16.)

14 To assess assumptions underlying amount-in-controversy calculations, *Jauregui*  
15 dictates that:

16 Where a defendant's assumption is unreasonable on its face  
17 without comparison to a better alternative, a district court  
18 may be justified in simply rejecting that assumption and  
19 concluding that the defendant failed to meet its burden. But  
20 often . . . the reason a defendant's assumption is rejected is  
21 because a different, better assumption is identified. Where  
22 that's the case, the district court should consider the claim  
23 under the better assumption—not just zero-out the claim.

24 28 F.4th at 996. Following this directive, the Court has analyzed Defendants'  
25 assumptions to determine if any are evidently unreasonable or baseless and has  
26 considered better alternatives where necessary. *Id.*; *see also Ibarra*, 775 F.3d at 1199  
27 ("[A]ssumptions cannot be pulled from thin air but need some reasonable ground  
28 underlying them."). Plaintiff did not initially provide alternative assumptions in her  
Motion to Remand. However, when prompted at the hearing, Plaintiff's counsel  
proposed a 1-2% violation rate for the overtime, minimum wage, meal and rest break,

1 and waiting time violations. The Court finds that Plaintiff's counterproposal is patently  
2 unreasonable as it is inconsistent with the allegations in the Complaint, including that  
3 there is a practice and policy on the part of Defendants. (*See Compl.* ¶¶ 33, 68.) As  
4 Plaintiff does not provide a "better assumption," the Court has disregarded Plaintiff's  
5 counterproposal in its assessment below.

6                           **a. Defendants' Overtime Calculation is Unreasonable**

7                           Defendants estimate one hour of unpaid overtime per week for each class  
8 member based on Plaintiff's allegation that "Defendants have, at times, failed to pay  
9 overtime wages to Plaintiff and Class Members, or some of them, in violation of  
10 California state wage and hour laws as a result of . . . among other things, failing to  
11 accurately track and/or pay for all minutes actually worked at the proper overtime rate  
12 of pay." (Compl. ¶ 15.) Each non-exempt employee is entitled to be paid one and  
13 one-half times their regular rate of pay for time worked in excess of 8 hours per  
14 workday and/or more than 40 hours per workweek. Cal. Lab. Code § 510. However,  
15 Defendants calculated the average shift length for non-exempt employees to be 5.7  
16 hours. (*See* Thacker Decl. ¶ 12.d.) This average shift length falls far short of the shift  
17 length required for overtime to accrue, i.e., 8 hours. Even assuming class members  
18 were at times required to work off-the-clock, Defendants currently assume only one  
19 hour per week of unpaid minimum wages per class member. One hour of unpaid  
20 minimum wages, when added to an average shift length of 5.7 hours, does not readily  
21 support a conclusion that there was also one hour of unpaid overtime per week for  
22 each class member. Thus, the Court rejects Defendants' overtime calculation as being  
23 unreasonable on its face.

24                           **b. Defendants' Minimum Wage and Meal and Rest Break**  
25                           **Calculations are Reasonable**

26                           Defendants' minimum wage and meal and rest break calculations are  
27 reasonable. Plaintiff pleads that "Defendants have, at times, failed to pay minimum  
28 wages to Plaintiff and Class Members, or some of them . . . [by] failing to accurately

1 track and/or pay for all hours actually worked at their regular rate of pay that is above  
2 the minimum wage." (Compl. ¶ 16.) Plaintiff further alleges "Defendants have, at  
3 times failed to provide Plaintiff and Class Members, or some of them, full, timely thirty  
4 (30) minute uninterrupted meal period[s]" and "have, at times, failed to authorize and  
5 permit Plaintiff and Class Members, or some of them, to take rest periods of at least  
6 ten (10) minutes." (*Id.* ¶¶ 17-18.)

7 On the one hand, Plaintiff uses limiting language throughout the Complaint by  
8 stating Defendants "at times" failed to pay for all hours worked or provide meal and  
9 rest periods, indicating this may have been a sporadic rather than regular failing.  
10 *Compare Johnson*, 2022 WL 2901579, at \*3 (defendants' assumption that class  
11 members missed two meal breaks and two rest breaks per week was reasonable given  
12 that plaintiff alleged putative class members were "regularly denied" legally compliant  
13 breaks and were "often" or "routinely" unable to take compliant breaks due to  
14 defendants' "uniform policies/practices") with *Duran v. Allegis Global Solutions, Inc.*,  
15 No. 20-cv-09025-JD, 2021 WL 3281073, at \*3 (N.D. Cal. Aug. 2, 2021) (where a  
16 complaint includes limiting language to describe the rate of violations, such as "at  
17 times" or "on occasion," and defendant fails to provide any evidence to suggest  
18 otherwise, even an assumption of 20% is unreasonable).

19 On the other hand, Defendants account for the limiting language used in the  
20 Complaint by assuming only one hour per week of unpaid minimum wages and  
21 applying only a 40% violation rate for meal and rest break periods. Defendants also  
22 use the lowest minimum wage mandated during the applicable period and use a  
23 narrower time period and class size than what is pled in the Complaint.<sup>8</sup> While Plaintiff  
24 uses language potentially limiting recovery to only some class members, i.e., "or some  
25 of them," "or" indicates that all class members could conceivably recover, and "the  
26 amount in controversy reflects the maximum recovery the plaintiff could reasonably  
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28 <sup>8</sup> See n.2 *supra*.

1 recover." *Arias*, 936 F.3d at 927. Further, courts in this district have found an  
 2 assumption of one hour of unpaid minimum wages per employee per workweek and  
 3 a 20-60% violation rate for meal and rest breaks to be reasonable, even if a complaint  
 4 uses limiting language, when a plaintiff alleges a policy or practice on the part of  
 5 defendants. *See, e.g., Cabrera v. South Valley Almond Co., LLC*, No. 1:21-CV-00748-  
 6 AWI-JLT, 2021 WL 5937585, at \*8 (E.D. Cal. Dec. 16, 2021) ("[A]ssumptions of one  
 7 hour of unpaid overtime per week and one hour of unpaid minimum wages per week  
 8 are consistent with allegations that violations occurred 'at times' and 'on occasion,'  
 9 particularly [when a] Complaint alleges that the Labor Code violations at issue [ ] are  
 10 due to 'policies and/or practices' on the part of [d]efendants."); *Sanchez v. Abbott  
 Lab'ys*, No. 2:20-cv-01436-TLN-AC, 2021 WL 2679057, at \*5 (E.D. Cal. June 30, 2021)  
 11 (collecting cases and applying a 40% violation rate for meal break claims and 20%  
 12 violation rate for rest period claims based on the parties' arguments and the  
 13 allegations in the complaint). Here, Plaintiff explicitly alleges a policy or practice on  
 14 the part of Defendants. (*See Compl.* ¶ 33 ("Class Members, as further described  
 15 therein, have been damaged and are entitled to recovery by reason of Defendants'  
 16 policies and/or practices that have resulted in the violation of the Labor Code at times,  
 17 as set out herein.").)

19       Given that Plaintiff alleges a policy/practice by Defendants, Defendants'  
 20 violation rates for the minimum wage and meal and rest break calculations account for  
 21 limiting language in the Complaint, and the violation rates fall within the range  
 22 approved by other courts, the Court finds that that Defendants' assumptions are  
 23 reasonable on their face. Together, the minimum wage and meal and rest break  
 24 calculations total \$3,889,814.28.<sup>9</sup>

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 26       <sup>9</sup> Even if the Court were to adjust the meal and rest period violation rate down to 20%, *see, e.g.,*  
 27 *Ramirez v. Cornerstone Bldg. Brands*, No. 2:21-CV-01017-MCE-JDP, 2022 WL 1556664, at \*1 (E.D. Cal.  
 28 May 17, 2022) (20% violation rate was reasonable where complaint contained allegations of violations  
 occurring "often" or "from time to time" as well as violations resulting from "company-wide policies and  
 procedures"), the minimum wage and meal and rest break calculations total would be \$2,535,926.14.

**c. Defendants' Waiting Time and Attorneys' Fees Calculations  
are Reasonable**

Defendants' calculation of penalties for their alleged failure to timely pay wages to discharged or quitting employees under Labor Code section 203 (known as "waiting time penalties") is similarly reasonable. Critically, the recovery of waiting time penalties does not hinge on the number of violations committed; rather Defendants "need only have caused and failed to remedy a single violation per employee for waiting time penalties to apply." *Noriesta v. Konica Minolta Bus. Solutions U.S.A.*, No. ED CV 19-0839-DOC-SPx, 2019 WL 7987117, at \*6 (C.D. Cal. June 21, 2019); *see also* Cal. Lab. Code § 203. Based on Defendants' assumptions regarding the minimum wage and meal and rest break violations, which the Court has found to be reasonable, it is also reasonable to assume all or nearly all employees in the class would be entitled to recovery of waiting time penalties. *See Cavada v. Inter-Continental Hotels Grp.*, No. 19cv1675-GPC-BLM, 2019 WL 5677846, at \*9 (S.D. Cal. Nov. 1, 2019) ("Because the waiting time penalties are also based on the one missed meal and one missed rest breaks, a 100% violation rate . . . is based on a reasonable assumption"); *Noriesta*, 2019 WL 7987117, at \*6 (holding that if "Defendant had a 'pattern and practice' of refusing to grant meal and rest breaks or pay class members for all hours worked, then it is likely that all or nearly all class members experienced [waiting time] violations"). Defendants' waiting time penalties calculation, \$2,378,141.46, plus the minimum wage and meal and rest break calculation, \$3,889,814.28, comfortably exceeds the amount-in-controversy requirement even without attorneys' fees.

Even assuming the 100% violation rate were not reasonable, district courts have found that violation rates of 25% to 60% for waiting time penalties can be reasonably assumed as a matter of law based on “pattern and practice” or “policy and practice” allegation. (See Compl. ¶ 68 (“Defendants . . . intentionally adopted policies or

Along with waiting time penalties of \$2,378,141.46 and attorney's fees of about 25%, which the Court finds below to be reasonable, the amount-in-controversy surpasses \$5 million.

1 practices incompatible with the requirements of Labor Code sections 201 and 202  
2 resulting in the failure, at times, to pay all wages . . . .");) *see also Avila*, 432 F. Supp. 3d  
3 at 1189 (finding "a violation rate of 40%—a median between 25% and 60%—to be  
4 reasonable" for waiting time penalties). Applying a 25% rate, the waiting time  
5 penalties total \$595,808.46. *See, e.g., Ramirez v. HV Glob. Mgmt. Corp.*, No. 21-cv-  
6 09955-BLF, 2022 WL 1210402, at \*6 (N.D. Cal. Apr. 25, 2022) (applying 25% violation  
7 rate and rejecting defendants proffered 100% violation rate for waiting time penalties,  
8 where "Defendants provide little justification for assuming a 100% violation rate").  
9 While this alone would be insufficient to meet the amount-in-controversy requirement,  
10 as the minimum wage, meal and rest period, and waiting time penalties calculations  
11 combined would total \$4,485,622.74, attorneys' fees may also be included in  
12 determining the amount-in-controversy where underlying statutes authorize an award  
13 of attorneys' fees, which is the case here. *Galt G/S*, 142 F.3d at 1155-56; *see also*  
14 *Fritsch v. Swift Transp. Co. of Ariz.*, 899 F.3d 785, 794 (9th Cir. 2018). The benchmark  
15 for class action attorneys' fees in the Ninth Circuit is 25%, with 20-30% as the usual  
16 range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). If the  
17 amount-in-controversy is \$4,485,622.74, attorneys' fees in the amount of \$514,377.25,  
18 or a little over 10%, would be sufficient to meet the amount-in-controversy. It is  
19 reasonable to assume that attorneys' fees would exceed 10%.

20 Thus, the Court holds the amount-in-controversy requirement is satisfied.

21 **B. Equitable Jurisdiction**

22 Plaintiff alleges another basis for remand of this action is the Court's lack of  
23 federal equitable jurisdiction over Plaintiff's claim under California's UCL for restitution  
24 of unpaid wages. (Mot. Remand at 16-18.) Equitable relief in federal court is subject  
25 to restrictions, most relevantly here that "a plain, adequate and complete remedy at  
26 law must be wanting." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 840 (9th Cir.  
27 2020) (quoting *Guar. Tr. Co. v. York*, 326 U.S. 99, at 105-06 (1945)). This rule applies  
28 to all claims for equitable relief in federal courts, regardless of whether federal or state

1 substantive law supplies the claimed right to relief. *See id.* at 841. Thus, "if the  
2 plaintiff cannot show a lack of adequate remedies at law, the court lacks equitable  
3 jurisdiction over the UCL claim." *Guthrie v. Transamerica Life Ins. Co.*, 561 F. Supp. 3d  
4 869, 875 (N.D. Cal. 2021). Plaintiff has not pled an inadequate remedy at law.

5 However, "[e]quitable jurisdiction is distinct from subject matter jurisdiction,"  
6 *Treinish v. iFit, Inc.*, No. CV 22-4687-DMG-SKx, 2022 WL 5027083, at \*4 (C.D. Cal. Oct.  
7 3, 2022), and a motion to remand a case "on the basis of any defect other than lack of  
8 subject matter jurisdiction must be made within 30 days after the filing of the notice of  
9 removal . . ." 28 U.S.C. § 1447(c). Plaintiff did not bring this motion until well after 30  
10 days following removal, making her motion to remand the UCL claim untimely.

11 In addition, because section 1447(c) is restricted to subject matter jurisdiction, it  
12 does not provide an adequate legal justification to remand this case. *See Treinish*,  
13 2022 WL 5027083, at \*4. The Ninth Circuit has never explicitly held that a failure to  
14 allege an inadequate legal remedy deprives a court of subject matter jurisdiction over  
15 claims for equitable relief, and district courts in the Ninth Circuit have repeatedly  
16 dismissed claims for equitable relief under Rule 12(b)(6), not based on a lack of  
17 jurisdiction. *Lopez v. Cequel Commc'ns, LLC*, No. 2:20-cv-02242-TLN-JDP, 2021 WL  
18 4476831, at \*2 (E.D. Cal. Sept. 29, 2021) (collecting cases). The single case  
19 remanding UCL claims in lieu of dismissal involved a situation where only equitable  
20 claims remained, and therefore remand was the only option for those claims to be  
21 heard. *See Guthrie*, 561 F. Supp. 3d at 878. This is distinct from the instant case in  
22 which the Court has valid subject matter jurisdiction under CAFA.

23 Thus, this Court is not compelled to remand this matter based on Plaintiff's UCL  
24 claim.

25 **MOTION TO COMPEL ARBITRATION**

26 **I. Legal Standard**

27 The Federal Arbitration Act ("FAA") governs arbitration agreements. 9 U.S.C.  
28 § 2. The FAA affords parties the right to obtain an order directing that arbitration

1 proceed in the manner provided for in the agreement. 9 U.S.C. § 4. To decide on a  
2 motion to compel arbitration, a court must determine: (1) whether a valid agreement  
3 to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute  
4 at issue. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1017 (9th Cir. 2016).  
5 “Arbitration is a matter of contract, and the FAA requires courts to honor parties’  
6 expectations.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). However,  
7 parties may use general contract defenses to invalidate an agreement to arbitrate.  
8 See *id.* at 339. Thus, a court should order arbitration of a dispute only where satisfied  
9 neither the agreement’s formation nor enforceability or applicability to the dispute is  
10 in issue. See *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010).  
11 “Where a party contests either or both matters, ‘the court’ must resolve the  
12 disagreement,” *id.*, because a party cannot be required to submit to arbitration any  
13 dispute it has not agreed to.” *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th  
14 Cir. 2014) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S.  
15 574, 582 (1960)). If a valid arbitration agreement encompassing the dispute exists,  
16 arbitration is mandatory. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

17 Under section 3 of the FAA, a court, “upon being satisfied that the issue  
18 involved . . . is referable to arbitration, shall on application of one of the parties stay  
19 the trial of the action until such arbitration has been had in accordance with the terms  
20 of the agreement.” 9 U.S.C. § 3.

## 21 **II. Discussion**

22 For the reasons set forth below, the Court finds that the evidence submitted by  
23 Defendants proves the existence of the Agreement. The Court also finds that the  
24 Agreement contains a valid clause which delegates questions of arbitrability to the  
25 arbitrator, and that this clause is neither procedurally nor substantively  
26 unconscionable. Thus, the delegation clause will be enforced, and this matter will be  
27 stayed pending the arbitrator’s decision concerning unconscionability. (See Mot.  
28 Compel Arb. at 13 (requesting the Court stay this case pending arbitration);) see also

1       *Whitney v. Suburban Propane, L.P.*, No. 2:22-cv-00633-WBS-AC, 2022 WL 2789950, at  
2 \*5 (E.D. Cal. July 15, 2022) (ordering parties to arbitrate gateway issues of arbitrability,  
3 unconscionability, and lack of mutuality in accordance with the delegation clause in  
4 their agreement, and staying the matter pending arbitration); *Abaya v. Total Acct.  
5 Recovery, LLC*, No. 2:15-cv-01269-MCE-CKD, 2016 WL 3407783, at \*3 (E.D. Cal. June  
6 20, 2016) (staying case pending completion of arbitration).

7              **A. Existence of Valid Arbitration Agreement**

8       Defendants allege that Plaintiff electronically signed the Agreement, titled "Big  
9 Lots Mutual Arbitration Agreement for Current Associates," on September 16, 2019.  
10 (Mot. Compel Arb. at 6.) As proof of this, they offer a declaration of Brett Tiberi (the  
11 "Tiberi Declaration"), a compensation and data analytics manager employed by Big  
12 Lots who has "personal knowledge of the process by which Big Lots Stores provides  
13 certain employment-related documents to associates." (Tiberi Decl. (ECF No. 7-3)  
14 ¶¶ 1-2.) Tiberi states that Big Lots maintains an online database called Big Lots  
15 University where employees access and acknowledge employment-related  
16 documents using a unique employee ID assigned to each associate and a private  
17 password. (*Id.* ¶ 3.) Big Lots uploaded the Agreement to Big Lots University in 2019,  
18 and associates were provided with a link to read the Agreement, instructed to read  
19 the entire document before acknowledging it, and encouraged to contact human  
20 resources if they had any questions. (*Id.* ¶¶ 6-7.) Once associates read the  
21 Agreement, they had to affirmatively click a box to indicate their acknowledgement.  
22 (*Id.* ¶ 7.) By clicking the box, associates represented that: (1) they agreed to the terms  
23 of the Agreement; (2) they entered into the Agreement voluntarily and had adequate  
24 time to review the terms; and (3) they agreed to sign the Agreement electronically and  
25 that their electronic signature was legally binding and the equivalent of a handwritten  
26 signature. (Tiberi Decl. Ex. 2 (ECF No. 28).) If the associate accepted the terms of the  
27 Agreement, it would appear as "completed" on the associate's eLearning history.  
28 (Tiberi Decl. ¶ 8.) Tiberi accessed Plaintiff's eLearning history by searching the Big

1 Lots University database, and her history demonstrated that she electronically signed  
 2 the Agreement on September 16, 2019. (*Id.* ¶ 11; Tiberi Decl. Ex. 3 (ECF No. 7-3).)  
 3 Plaintiff counters that she has no recollection of signing the Agreement, and that  
 4 Tiberi lacks personal knowledge of Plaintiff signing the Agreement. (Opp'n Arb. at 4;  
 5 DeMaria Decl. (ECF No. 11-1) ¶¶ 4-9.)

6       The party seeking to compel arbitration bears the burden of proving by a  
 7 preponderance of the evidence the existence of an agreement to arbitrate. *Ashbey v.*  
 8 *Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015). In resolving a  
 9 motion to compel arbitration, “[t]he summary judgment standard [of Federal Rule of  
 10 Civil Procedure 56] is appropriate because the district court’s order compelling  
 11 arbitration ‘is in effect a summary disposition of the issue of whether or not there had  
 12 been a meeting of the minds on the agreement to arbitrate.’” *Hansen v. LMB Mortg.*  
 13 *Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021) (quoting *Par-Knit Mills, Inc. v. Stockbridge*  
 14 *Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980)). Under this standard of review, “[t]he  
 15 party opposing arbitration receives the benefit of any reasonable doubts and the  
 16 court draws reasonable inferences in that party’s favor, and only when no genuine  
 17 disputes of material fact surround the arbitration agreement’s existence and  
 18 applicability may the court compel arbitration.” *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-  
 19 cv-01293-KJM-KJN, 2016 WL 881134, at \*4 (E.D. Cal. Mar. 8, 2016). “A material fact is  
 20 genuine if ‘the evidence is such that a reasonable jury could return a verdict for the  
 21 nonmoving party.’” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992)  
 22 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Conversely,  
 23 “where the record taken as a whole could not lead a rational trier of fact to find for the  
 24 nonmoving party, there is no ‘genuine issue for trial.’” *Id.* (quoting *Matsushita Elec.*  
 25 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

26       Plaintiff’s claim that an arbitration agreement does not exist between the Parties  
 27 lacks merit. First, Plaintiff never expressly denied the existence of the Agreement.  
 28 Rather, Plaintiff alleged only that she had no recollection of receiving and signing the

1 Agreement. However, “nothing in the law requires a party to remember having  
2 contracted for the agreement to be valid,” nor is an “employer required to explain the  
3 details of [a] contract” to a plaintiff or “force [them] to read it.” *Pinto v. Squaw Valley*  
4 *Resort, LLC*, No. 2:17-cv-02281-MCE-CKD, 2018 WL 5630702, at \*2 (E.D. Cal. Oct. 31,  
5 2018). Thus, the fact that Plaintiff “does not remember signing [the] Agreement . . . is  
6 not sufficient” to challenge its existence. *Garcia v. NRI USA, LLC*, No. 2:17-CV-08355-  
7 ODW-GJS, 2018 WL 3702293, at \*3 (C.D. Cal. Aug. 1, 2018); *see also Chalian v. CVS*  
8 *Pharm., Inc.*, No. CV 16-08979-AB-AGRx, 2017 WL 6940520, at \*2 (C.D. Cal. Oct. 17,  
9 2017) (finding that the electronic signature on an agreement made it enforceable  
10 despite plaintiff’s statement that she did not recall signing); *Bolanos v. Khalatian*, 231  
11 Cal. App. 3d 1586, 1590 (1991) (enforcing arbitration agreement despite plaintiff  
12 declaring that she did “not remember signing it”).

13 Second, Plaintiff’s implication that she did not sign the Agreement is  
14 contradicted by Tiberi’s Declaration. Tiberi states that Plaintiff’s eLearning history  
15 demonstrates she logged into the Big Lots University portal and checked a box stating  
16 she agreed to the terms of the Agreement and to be bound by the Agreement.  
17 (Tiberi Decl. ¶ 11.) Under California law, electronic signatures are acceptable if they  
18 are “the act of the person,” which “may be shown in any manner, including a showing  
19 of the efficacy of any security procedure” that applies to the electronic signature  
20 process. Cal. Civ. Code § 1633.9(a). Every Big Lots employee was assigned a unique  
21 employee ID and created their own secure password for the Big Lots University portal.  
22 (Tiberi Decl. ¶ 3.) Thus, the record demonstrates Plaintiff signed the Agreement,  
23 thereby acknowledging her review and assent to the terms.

24 Further, the Tiberi Declaration establishes Tiberi has personal knowledge that a  
25 valid Agreement exists. Under Federal Rule of Evidence 602, a witness may testify to a  
26 matter only if evidence is introduced sufficient to support a finding that the witness  
27 has personal knowledge of the matter; such evidence may consist of the witness’s  
28 testimony. Fed. R. Evid. 602. Here, Tiberi provides information about his position as a

1 Compensation and Data Analytics Manager, his access to records maintained by  
2 Defendants in its usual course of business, the process by which associates, including  
3 Plaintiff, created profiles and login information on the Big Lots University portal, and  
4 how Plaintiff would have accessed and signed the Agreement. (Tiberi Decl. ¶¶ 1-9.)  
5 This information lays a proper foundation and establishes Tiberi's personal knowledge  
6 of the Agreement attached to his Declaration. *See Mitchell v. Ecolab, Inc.*, No. 1:22-  
7 cv-01088-EPG, 2023 WL 2666391, at \*4-5 (E.D. Cal. Mar. 28, 2023) (a witness's review  
8 of business records and familiarity with company procedures laid a proper foundation  
9 and established their testimony about an arbitration agreement's existence was based  
10 on personal knowledge); *see also Rizvanovic v. United Parcel Service, Inc.*, No. 1:21-  
11 cv-01278-CDB, 2023 WL 346800, at \*6 (E.D. Cal. Jan. 20, 2023) (same); *Wright v.*  
12 *Sirius XM Radio Inc.*, No. SACV 16-01688-JVS-JCGx, 2017 WL 4676580, at \*2 (C.D.  
13 Cal. June 1, 2017) (same).

14 Thus, the Court finds that Defendants have shown by a preponderance of the  
15 evidence the Agreement exists.

16 **B. Delegation Clause**

17 Defendants argue that the Agreement signed by Plaintiff contains the following  
18 delegation clause:

19 This Agreement applies to all Covered Claims regardless of  
20 the date they accrued, and the terms of this Agreement  
21 remain in effect after your employment relationship with Big  
22 Lots terminates. Covered Claims also include any dispute  
23 relating to the interpretation, applicability, enforceability, or  
24 formation of this Agreement, including but not limited to any  
25 claim that all or part of this Agreement is void or voidable.  
The arbitrator has exclusive authority to decide such  
disputes, including but not limited to disputes regarding the  
arbitrability of Covered Claims.

26 (Tiberi Decl. Ex. 1 (ECF No. 7-3), at 1; Reply Arb. at 4.)

27 The Supreme Court has recognized that parties can agree to arbitrate threshold  
28 issues concerning the arbitration agreement. *Rent-A-Center, West, Inc. v. Jackson*,

1 561 U.S. 63, 68-69 (2010) (quotations omitted). In general, parties may delegate  
 2 threshold questions to the arbitrator, if by “clear and unmistakable evidence,” the  
 3 parties have chosen to do so. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th  
 4 Cir. 2015); *see also Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (holding that a  
 5 clause in an arbitration agreement, which specified that “the validity or application” of  
 6 the agreement was to be resolved through arbitration, constituted a clear and  
 7 unmistakable agreement to delegate issues of arbitrability). The delegation clause  
 8 here clearly delegates the Parties’ dispute concerning the enforceability of the  
 9 Agreement to the arbitrator.

10 Further, the Ninth Circuit has held that incorporation of the American  
 11 Arbitration Association (“AAA”) rules in an arbitration agreement “constitutes clear  
 12 and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.”  
 13 *Brennan*, 796 F.3d at 1130.<sup>10</sup> The agreement explicitly incorporates the AAA rules,  
 14 further weighing in favor of upholding the delegation clause. (*See* Tiberi Decl. Ex. 1,  
 15 at 2; *see also LaCross v. Knight Transp. Inc.*, No. CV-15-00990-PHX-JJT, 2016 WL  
 16 11527434, at \*3 (D. Az. Sept. 22, 2016) (“[T]he delegation clause here, in addition to  
 17 incorporating the AAA rules, explicitly provides that any dispute . . . is subject to  
 18 arbitration. The delegation provision was thus clear and unmistakable with regard to  
 19 the intent of the parties—even if unsophisticated—to arbitrate the enforceability of the  
 20 Arbitration Agreement.”).

21 Plaintiff argues that the delegation clause is unenforceable as it is  
 22 unconscionable. (Suppl. Opp’n Arb. at 3-5.) Under California law, unconscionability  
 23 has a procedural element and a substantive element. *See OTO, LLC v. Kho*, 8 Cal. 5th

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24  
 25 <sup>10</sup> While *Brennan* addressed an agreement executed between “sophisticated” parties, the court stated  
 26 that its holding “should not be interpreted to require that the contracting parties be sophisticated or  
 27 that the contract be ‘commercial’ before a court may conclude that incorporation of the AAA rules  
 28 constitutes ‘clear and unmistakable’ evidence of the parties’ intent,” 796 F.3d at 1130, and courts in the  
 Ninth Circuit have upheld *Brennan*’s rule with respect to non-sophisticated parties. *See McLellan v.*  
*Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at \*2 (N.D. Cal. Oct. 11, 2017) (“The greater  
 weight of authority has concluded that that the holding of [Brennan] applies similarly to non-  
 sophisticated parties.” (citations omitted)).

1 111, 125 (2019); *Iyere v. Wise Auto Grp.*, 87 Cal. App. 5th 747, 759 (2023). The  
2 procedural element addresses the circumstances of contract negotiation and  
3 formation, focusing on oppression and surprise due to unequal bargaining power,  
4 while the substantive element pertains to the fairness of an agreement's actual terms  
5 and whether they are overly harsh or one-sided. *OTO*, 8 Cal. 5th at 125; *Iyere*, 87 Cal.  
6 App. 5th at 759. While both the procedural and substantive elements must be  
7 present to establish unconscionability, they need not be present in the same degree;  
8 the more one element is present, the less present the other element need be. See  
9 *OTO*, 8 Cal. 5th at 125-26; *Iyere*, 87 Cal. App. 5th at 759.

10 Procedurally, Plaintiff argues that the delegation clause is unenforceable  
11 because it was included in a "take it or leave it" agreement which gave no indication  
12 that negotiation was permitted and failed to call attention to the clause, (Suppl. Opp'n  
13 Arb. at 3-4,) relying heavily on the Ninth Circuit's decision in *Lim v. TForce Logistics,*  
14 *LLC*, 8 F.4th 992, 1001 (9th Cir. 2021).

15 Plaintiff's argument is unavailing. First, while Plaintiff is correct the Agreement  
16 was not subject to negotiation, Plaintiff's continued employment at Big Lots was not  
17 conditioned on signing the Agreement. Rather, the Agreement stated quite clearly on  
18 the first page "[i]t is your voluntary choice whether or not to sign this Agreement. Your  
19 employment with Big Lots will not be affected by whatever choice you make." (Tiberi  
20 Decl. Ex. 1, at 1.) The signature page also stated that by signing the Agreement, an  
21 associate would be voluntarily entering into the Agreement. (Tiberi Decl. Ex 2.)  
22 Plaintiff has presented no evidence that she was told signing the Agreement was a  
23 condition of her continued employment, or that she was otherwise pressured into  
24 signing. Thus, Plaintiff had a meaningful choice whether to agree to the terms of the  
25 Agreement, including the delegation clause. *See Mohamed v. Uber Techs., Inc.*, 848  
26 F.3d 1201, 1212 (9th Cir. 2016) ("An arbitration agreement is not adhesive if there is  
27 an opportunity to opt out of it."); *cf. Lim*, 8 F.4th at 997 (a delegation clause was  
28

1 procedurally unconscionable when plaintiff was told to either sign an employment  
2 agreement which mandated arbitration or lose his job).

3       Further, the delegation clause here was not hidden in voluminous pages or  
4 small text, but was clearly printed on the first page of the Agreement. (Tiberi Decl. Ex.  
5 1, at 1; ) *see Tovar v. GC Servs. Ltd. P'ship*, No. 3:21-CV-1597-CAB-BGS, 2021 WL  
6 5989944, at \*4 (S.D. Cal. Dec. 17, 2021) (finding a low degree of procedural  
7 unconscionability where the delegation clause appeared in the first numbered  
8 paragraph of the agreement in legible font); *cf. Lim*, 8 F.4th at 1001 (finding unfair  
9 surprise where the delegation clause was contained "in the middle of 31 numbered  
10 paragraphs, within more than nine pages of single-spaced, 10-point font").

11       Finally, the drafter of an agreement is under no obligation to specifically bring  
12 an arbitration or delegation clause to the signing party's attention. *See Lim*, 8 F.4th at  
13 1001. Thus, the Court finds that the delegation clause was neither oppressive nor an  
14 unfair surprise. *OTO*, 8 Cal. 5th at 126 ("Oppression occurs where a contract involves  
15 lack of negotiation and meaningful choice, surprise where the allegedly  
16 unconscionable provision is hidden within a prolix printed form." (quoting *Pinnacle*  
17 *Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 247  
18 (2012))).

19       Substantively, Plaintiff argues the clause is unconscionable because it imposes  
20 fee-splitting requirements on employees and also includes a "prevailing party"  
21 provision whereby an arbitrator may award attorney's costs and fees to the prevailing  
22 party and order the losing party to cover those costs. (Suppl. Opp'n Arb. at 4.)

23       Plaintiff first argues that pre-selection of the AAA creates a business relationship  
24 between Defendants and the AAA such that "AAA arbitrators may be inclined towards  
25 arbitration and also towards awarding costs to the Plaintiff." (Suppl. Opp'n Arb. at 4.)  
26 However, courts have previously found arguments along these lines to be preempted  
27 by the FAA. *See Malone v. Superior Ct.*, 226 Cal. App. 4th 1551, 1569-70 (2014)  
28 (holding plaintiff's argument that a delegation clause was substantively

1 unconscionable because the arbitrator had an interest in finding the agreement  
2 arbitrable, i.e., being compensated for arbitrating the dispute and being considered  
3 for further arbitration assignments, was preempted by the FAA as discriminating  
4 against arbitration). Thus, the Court will disregard this argument.

5 Plaintiff further argues that the prevailing party provision creates an imbalance  
6 in power which suggests that provision, as applied to the delegation clause, is  
7 substantively unconscionable. (Suppl. Opp'n Arb. at 5.) Imposing arbitration  
8 expenses on an employee that they would not otherwise bear in federal court is  
9 unconscionable, regardless of their ability to pay. *See Pokorny v. Quixtar, Inc.*, 601  
10 F.3d 987, 1004 (9th Cir. 2010), *overruled on other grounds by Poublon v. C.H.*  
11 *Robinson Co.*, 846 F.3d 1251, 1265-66 (9th Cir. 2017); *see also Armendariz v. Found.*  
12 *Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 110-11 (2000). Thus, courts have held  
13 that “[p]rovisions requiring bilateral, attorney fee shifting, i.e., in which the prevailing  
14 party—whether employer or employee—may be awarded fees, are unconscionable  
15 when they conflict with governing statutes that allow one-way fee shifting in favor of  
16 the employee.” *Bermudez v. Primelending*, No. LA CV12-00987-JAK-Ex, 2012 WL  
17 12893080, at \*9 (C.D. Cal. Aug. 14, 2012). Plaintiff has sought attorneys’ fees and  
18 costs under various California Labor Code sections which apply an asymmetric rule for  
19 awarding fees, e.g., sections 226, 1194, and 2802. (Compl. ¶¶ 41, 55, 79, 86; *see*  
20 *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1251 (2012) (regarding section  
21 1194); *Mills v. Facility Sols. Grp., Inc.*, 84 Cal. App. 5th 1035, 1056 n.6 (2022)  
22 (regarding section 2802); *United Parcel Service Wage & Hour Cases*, 192 Cal. App.  
23 4th 1425, 1437 (2011) (regarding section 226). However, the plain language of the  
24 Agreement only allows the arbitrator to “award attorneys’ fees and/or costs to the  
25 prevailing party *if authorized by the applicable contract, statute, or law* under which  
26 the Claim is brought.” (Tiberi Decl. Ex. 1, at 3 (emphasis added).) “Courts have found  
27 that the inclusion of this limiting language in similar provisions renders the provision  
28 not substantively unconscionable.” *Cabanillas v. 4716 Inc.*, CV-20-00894-PHX-MTL,

1 2021 WL 3773765, at \*4 (D. Az. Aug. 25, 2021) (finding an attorneys' fees provision  
2 was not substantively unconscionable because the provision noted that costs and fees  
3 could be recovered by the prevailing party only "to the extent permitted by applicable  
4 law"); *see also Ridgeway v. Nabors Completion & Prod. Servs. Co.*, 725 F. App'x 472,  
5 474 (9th Cir. 2018) ("[T]he fees and expenses provision, are not unconscionable,  
6 because they contain the phrase 'except as otherwise provided by law.'"). Thus, this  
7 provision is not unconscionable as written.

8 Finally, Plaintiff argues that courts have held that fee-splitting provisions can be  
9 unconscionable as applied to low-income Plaintiffs, and that "Plaintiff, who was at the  
10 time a Big Lots employee making fourteen dollars per hour, could not afford the filing  
11 fee nor could she possibly afford paying Big Lots' attorney's fees and costs." (Suppl.  
12 Opp'n Arb. at 5.) The California Supreme Court has held that "when an employer  
13 imposes mandatory arbitration as a condition of employment, the arbitration  
14 agreement or arbitration process cannot generally require the employee to bear any  
15 type of expense that the employee would not be required to bear if he or she were  
16 free to bring the action in court." *Armendariz*, 24 Cal. 4th at 110-11. Applying this  
17 principle, district courts have found cost-sharing provisions in employment arbitration  
18 agreements are substantively unconscionable because the employer generally has far  
19 greater resources and the employee should not be required to pay for the  
20 opportunity to present claims. *See, e.g., Ortolani v. Freedom Mortg. Corp.*, No. EDCV  
21 17-1462-JGB-KKx, 2017 WL 10518040, at \*6 (C.D. Cal. Nov. 16, 2017) (finding a fee-  
22 splitting provision to be unconscionable because it "require[d] the parties to share  
23 equally in the arbitration costs"); *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874-EJD,  
24 2012 WL 525538, at \*5 (N.D. Cal. Feb. 16, 2012) (same); *Chavarria v. Ralphs Grocer  
Co.*, 812 F. Supp. 2d 1079, 1088 (C.D. Cal. 2011) (same). Under the Agreement,  
25 Plaintiff's fee is capped at \$300 for filing for arbitration, while "Big Lots will pay the  
26 employer filing fee, AAA administrative costs and fees, the arbitrator's costs and fees,  
27 and any employee filing fees that exceed \$300." (Tiberi Decl. Ex. 1, at 3.) First, the  
28

1 Court notes that Plaintiff was not forced to enter the Agreement here as a condition of  
2 employment, an important distinction from *Armendariz*. Further, unlike in *Ortolani*,  
3 *Antonelli*, and *Chavarria*, the fees are not split evenly between the Parties; rather,  
4 Plaintiff's fees are capped at \$300. This fee is not so different from the \$350 filing fee  
5 required for federal civil litigation. See 28 U.S.C. § 1914. Thus, while the \$300 fee  
6 may indicate some level of substantive unconscionability given Plaintiff's economic  
7 status, it can hardly be said to be overly harsh or so one-sided as to shock the  
8 conscience given that Defendants must pay the remaining costs and fees. Thus, the  
9 delegation clause is not substantively unconscionable.

10 **CONCLUSION**

11 In accordance with the above, IT IS HEREBY ORDERED Plaintiff's Motion to  
12 Remand (ECF No. 18) is DENIED. Further, Defendants' Motion to Compel Arbitration  
13 (ECF No. 7) is GRANTED. This case is hereby STAYED pending the arbitrator's  
14 decision concerning arbitrability. The Parties shall file a joint status report within one  
15 week of the arbitrator's decision on arbitrability or by January 5, 2024, whichever is  
16 sooner.

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19 IT IS SO ORDERED.

20 Dated: September 28, 2023

  
Hon. Daniel J. Calabretta  
UNITED STATES DISTRICT JUDGE

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